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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. .....

BAYUK CIGARS INCORPORATED,
Petitioner,

against

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Pennsylvania, reported in 359 Pa. 202, which reversed a judgment of the Dauphin County of Pennsylvania reported in 58 Dauphin County. Reports, 396 (1947) (R. 70a).

1. SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner is a Maryland corporation maintaining its principal office and place of business in Philadelphia, Pennsylvania, where it engages in the manufacture and sale of cigars. Petitioner imports tobacco from foreign countries for use in the manufacture of cigars. From time to time portions of the tobacco so imported by petitioner are sold while located in a bonded warehouse.

On December 31, 1941 Petitioner owned tobacco imported by it, which tobacco was in its original and unbroken packages located in bonded warehouses in Pennsylvania and valued at $2,701,026. The duties on this tobacco had not been paid. In addition, petitioner owned tobacco imported by it and likewise kept in its original and unbroken packages in the Petitioner's plant, which tobacco was valued at $259,965.65.

Pursuant to a Pennsylvania statute, ACT OF MAY 8, 1901, P. L. 150, 72 PURDON STATUTE 1851, Petitioner for the year 1941 reported and paid a foreign bonus on all tangible property owned by it for use in Pennsylvania which included land, buildings, machinery, equipment and inventories. Included in the inventories was tobacco imported from foreign countries which had been removed from its original packages. Petitioner excluded from such inventories the tobaccos imported and owned by it and kept in its original and unbroken packages in bonded warehouses.

The taxing officers for the Commonwealth of Pennsylvania took the position that the value of all the tobacco imported by the Petitioner and held by it in its original and unbroken packages stored in bonded warehouses and in its own plant should be included in calculating Petitioner's "capital actually employed or to be employed wholly within the State of Pennsylvania" for the purposes of the above

mentioned Pennsylvania statute. A bonus of one-third of one percent of this amount ($2,960,989) or ($9,869.94) was thereupon imposed upon Petitioner.

Petitioner contends the imposition of the foreign bonus upon tobacco imported by it, and maintained in its original and unbroken packages, located in bonded warehouses, and in its own plants, is a violation of ARTICLE I, SECTION 10(2) and ARTICLE I, SECTION 8(3) of the UNITED STATES CONSTITUTION.

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2. STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(a) *Nature of the Case; Statutory Provision and Cases Believed to Sustain Jurisdiction:*

The Judgment of the Supreme Court of Pennsylvania which Petitioner endeavors to have examined and reversed here, holds the exaction of a foreign bonus upon the valuation of imports remaining in their original and unbroken packages for the privilege of doing a local business does not violate ARTICLE I, SECTION 10(2) or ARTICLE I, SECTION 8(3) of the CONSTITUTION OF THE UNITED STATES.

The jurisdiction of the Supreme Court of the United States is invoked under SECTION 237(b) as amended, of the JUDICIAL CODE (28 U. S. C. A. 344(b)).

The cases relied upon to sustain jurisdiction are:

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282 (1921);

Citizens National Bank of Cincinnati v. Durr, 257 U. S. 99 (1921); and

Fiske v. Kansas, 274 U. S. 380 (1926).

(b) *The Statute of Pennsylvania the Validity of Which Is Involved.*

SECTION 1 of the ACT OF MAY 8, 1901, P. L. 150, 72 P. S. 1851, provides as follows:

> "Be it enacted, etc., That from and after the passage of this act all corporations, limited partnerships or joint stock associations, except foreign insurance companies, chartered or created by or under the laws of any other State, or of the United States, or of any foreign country, whose principal office or chief place of business is located in this Commonwealth, or which have any part of their capital actually employed wholly within this State, in addition to complying with the laws now in force as to such corporations, limited partnership or joint stock-associations, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one percentum upon the amount of their capital actually employed or to be employed wholly within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed."

(c) *Date of Judgment Sought to be Reviewed.*

The judgment sought to be reviewed was entered by the Supreme Court of Pennsylvania on April 22, 1948. Petition for reargument was filed May 3, 1948. Petition for reargument was refused on May 24, 1948.

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3. QUESTIONS PRESENTED.

(a) Does the imposition of a bonus of one-third of one percent upon the valuation of imports remaining in their original and unbroken packages for the privilege of doing

a local business violate ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES?

(b) Does the imposition of a bonus of one-third of one percent upon the valuation of imports remaining in their original and unbroken packages for the privilege of doing a local business constitute a regulation of commerce in violation of ARTICLE I, SECTION 8(3) of the CONSTITUTION OF THE UNITED STATES, and TARIFF ACT OF 1930, 19 U. S. C. A. 1001 et seq., and REGULATION 942 promulgated thereunder, covering the importation of tobacco from foreign countries.

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4. REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

(a) In sustaining the power of the Commonwealth of Pennsylvania to impose a foreign bonus of one-third of one percent upon petitioner's imported tobacco while it remains in bonded warehouses and in petitioner's plant in the unbroken original packages in which it was imported, notwithstanding the limitation upon the power of the States to lay imposts contained in ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES, the Supreme Court of Pennsylvania has decided a federal question of substance in a way probably not in accord with the "original package" doctrine as declared by this Court in *Brown v. The State of Maryland*, 12 Wheaton 419 (U. S. 1827); *Low v. Austin*, 13 Wallace 29 (U. S. 1871); *Hooven & Allison Co. v. Evatt, Tax Commissioner of Ohio*, 324 U. S. 652 (1944).

(b) The State Court, in holding that the exaction of the foreign bonus in question does not constitute an interference with the congressional regulation of foreign commerce

in violation of ARTICLE I, SECTION 8(3), has decided a federal question of substance contrary to applicable decisions of this Court. *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414 (1939).

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5. PRAYER.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case numbered 5, May Term, 1948, entitled on its docket "*Commonwealth of Pennsylvania, Appellant v. Bayuk Cigars, Inc., Appellee,*" to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriately granted in the premises.

Jerome J. Rothschild

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1948. No.....

BAYUK CIGARS, INCORPORATED,
Petitioner,

against

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for writ of certiorari refers to the opinions of the Dauphin County Court and the Pennsylvania Supreme Court, the grounds upon which jurisdiction is invoked, and the pertinent constitutional and statutory provisions. It also sets forth a summary statement of the matter involved and states the questions presented.

1. STATEMENT OF THE CASE.

There is no dispute as to the facts in the case, stipulation of facts (R. 21a-31a), notice of final determination (R. 23a), appeal to the Dauphin County Court (R. 2a), transcript of proceedings and testimony (R. 16a, 20a).

Bayuk Cigars, Incorporated, petitioner herein, is a Maryland Corporation, and during the calendar year 1941 was engaged in business and had capital employed in the Commonwealth of Pennsylvania (R. 21a). On March 14, 1942, petitioner submitted to the Department of Revenue of Pennsylvania a foreign bonus report reflecting a total net book value of the greatest amount of capital in Pennsylvania at any one time during the year 1941 of $8,159,621.63, or an increase of capital over that upon which bonus had been previously paid of $1,388,856.87, upon which it paid a bonus of one-third of one percent at the time of filing the report (R. 21a). On September 14, 1942, the Department of Revenue settled, and on September 15, 1942, the Department of the Auditor General approved an account for foreign bonus against petitioner for the calendar year 1941 in the amount of $13,632.94 (R. 22a). The Commonwealth's taxing officers included as capital employed in Pennsylvania tobacco imported from foreign countries in the amount of $2,701,026, which was maintained in its original unbroken packages and stored in United States Government bonded warehouses, upon which duties remained unpaid, and tobacco imported from foreign countries in the amount of $259,963.65, which was maintained in its original unbroken packages and stored in appellant's plant (R. 22a, 23a). Portions of the tobacco imported from foreign countries and stores in bonded warehouses are sold. The other portions are withdrawn from bonded warehouses and used in its business of manufacturing cigars (R. 28a, 31a).

On December 11, 1942, petitioner filed with the Department of Revenue a petition requesting that there be eliminated from the $10,860,647 of capital determined by the Commonwealth's taxing officers to be employed in Pennsylvania the value of tobacco imported from foreign countries amounting to $2,960,989 (R. 23a). On August 9, 1943, petitioner was advised by the Department of Revenue and the Department of the Auditor General that its petition for resettlement had been refused (R. 23a). On October 2, 1943, petitioner filed with the Board of Finance and Revenue a petition for review. On December 9, 1943, the Board of Finance and Revenue denied the prayer of such petition and refused to resettle the said account (R. 23a). On February 3, 1944, petitioner filed its appeal with the Prothonotary of the Dauphin County Court (R. 24a).

Bayuk Cigars, Incorporated, is engaged in the manufacture and sale of cigars, and in the course of its business activities in the Commonwealth of Pennsylvania imports tobacco from foreign countries. The greatest value of said imports, which remain in unbroken packages, at any one time during the year 1941, was $2,960,989.65 (R. 24a). Of the said $2,960,989.65 of tobacco imported from foreign countries, $2,701,026 was maintained in its original unbroken packages and stored in United States Government bonded warehouses, upon which duties remained unpaid, and the balance of tobacco imported from foreign countries in the amount of $259,963.65 was maintained in its original unbroken packages and stored in appellant's plant. The said United States Government bonded warehouses were located in Pennsylvania. The appellant neither owned the said bonded warehouses nor had any interest therein (R. 25a). The said imports could be removed from said bonded warehouses only by payment of the import duties and warehousing charges (R. 25a). Title to the imported tobacco above mentioned was in the petitioner, having been paid for by letters of credit issued by Philadelphia banks. Said tobacco was purchased by petitioner's agent in foreign markets (R. 25a).

The Commonwealth's taxing officers imposed a bonus of one-third of one percent upon the said imported tobacco in the amount of $2,960,989, and arrived at an additional bonus due the Commonwealth of $9,869.94. After hearing, the Dauphin County Court found that the imposition of a foreign bonus upon said $2,960,989 of imported tobacco offended ARTICLE I, SECTION 10, (2), of the CONSTITUTION OF THE UNITED STATES (R. 88a), and that the petitioner was entitled to a credit in the amount of $9,869.94 (R. 89a). Respondent, the Commonwealth of Pennsylvania, on February 19, 1947, filed exceptions to the findings of fact, conclusions of law, opinion and decree nisi.

On April 17, 1947, the Dauphin County Court dismissed each of the exceptions filed by the Commonwealth (R. 105a). On May 20, 1947 Commonwealth of Pennsylvania appealed to the Supreme Court of Pennsylvania. The case was argued before the Pennsylvania Supreme Court on January 12, 1948. (359 Pa. 202, at p. 203.) The Pennsylvania Supreme Court handed down an opinion on April 22, 1948, reversing the Dauphin County Court, at p. 203. Mr. Justice Patterson dissented at p. 212. On Monday, May 3, 1948, petition for reargument was filed by the petitioner. On May 24, 1948, the Supreme Court of Pennsylvania entered the following order:

"May 24, 1948. Petition refused. Per Curiam."

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2. ARGUMENT.

(a) The imposition of a bonus of one-third of one percent upon the value of petitioner's tobacco imported from foreign countries and remaining in their original packages is the laying of an impost or duty in violation of ARTICLE I, SECTION 10 (2) of the CONSTITUTION OF THE UNITED STATES.

The Pennsylvania Statute imposes on foreign corporations:

> "* * * A bonus of one-third of one percentum upon the amount of their capital actually employed or to be employed wholly within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed." (Petition, p. 4.)

The Supreme Court of Pennsylvania cites *Commonwealth v. Danville Bessemer Company*, 207 Pa. 302, 56 A. 871 (1904), as demonstrating that "* * * the very act of 1901 with which we are concerned was recognized as prescribing 'not a tax * * * but a bonus, which is a consideration for the grant of a privilege or franchise * * *'".

Thus the bonus is imposed for the grant of a privilege: the right to bring in, use or employ capital in Pennsylvania. In the present case it is an exaction in consideration for the right to import tobacco from foreign countries. It is a license fee imposed for the privilege of bringing goods into the Commonwealth of Pennsylvania. The imposition of this bonus, or license fee, is directly opposed to the original package doctrine as annunciated by Chief Justice Marshall in the celebrated case of *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827). In that case the State of Maryland asserted its right to exact a license fee from an auctioneer for the privilege of conducting his business within the State. The goods sold by the auctioneer were imported by him for the purpose of sale. In declaring such license fee to be unconstitutional as violating ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES the Court stated:

> "But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

> It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made (paid). This the state has not a right to do, because it is prohibited by the Constitution." (at p. 444)

The force of Chief Justice Marshall's reasoning applies with equal vigor to the facts of the instant case.

In the case of *Anglo-Chilean Nitrate Sales Corporation v. State of Alabama*, 288 U. S. 218 (1932), the Alabama statute was practically identical with the PENNSYLVANIA FOREIGN BONUS ACT. The Court there stated:

> "Section 54, under which the assessment was made, declares that every corporation organized under the laws of any other State and doing business in Alabama, shall pay to the State an annual Franchise Tax of $2.00 on each $1,000 of the actual amount of capital employed therein." (at page 222)

This is a tax of one-fifth of one percent upon the amount of capital actually employed in Alabama. The only prop-

erty owned by the Company was imports in their original package. The Court concluded:

> "Alabama was powerless without consent of Congress to tax the nitrate before such sales or to require appellant by the *payment of occupation or franchise tax or otherwise* to purchase from it the privilege of selling goods so imported and handled * * *." (Emphasis supplied.) (at page 226)

If the Pennsylvania bonus is considered as a direct levy on imports it violates ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES. If it is considered to be in the nature of an occupation, license, franchise tax or otherwise, it violates the principles ennunciated in the above two cases.

In its opinion in the instant case the Supreme Court of Pennsylvania relies upon several cases in support of its position that the exaction of the bonus in question does not fall within the original package doctrine as set forth in *Brown v. Maryland, supra.* These cases are clearly distinguishable.

Flint v. Stone Tracy Company, 220 U. S. 107, 165 (1910), is cited as authority for the proposition that "* * * once the sovereign has exercised its right or power to impose a privilege or franchise tax, it is not fatal to the charge that it was measured on the basis of income produced in part from property which itself is not taxable; nor is it a valid objection that the measure included property which, as such, could not have been taxed directly". This case does not deal with the question of whether the measure of such a tax may include imported goods held in their original packages and therefore is only authority for the well-settled rule that non-taxable property *generally* may be used as such measure.

International Shoe Company v. Shartel, 279 U. S. 429, 433 (1928) is cited as authority for the proposition that "A franchise tax imposed on a corporation, foreign or

domestic; for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid * * * because a part of the property or capital included in computing the tax is used by it in interstate commerce." Similarly, this case does not deal with the special problem of imported goods, being concerned only with goods in interstate commerce.

In referring to *New York State v. Roberts*, 171 U. S. 658 (1898), the Supreme Court of Pennsylvania states that that case "* * * involved a State franchise tax measured upon a base which included income produced in part from the sale of imports in original packages * * *" Since no part of the tax there in question was measured directly by imported goods in their original packages Mr. Justice Shiras was perfectly justified in stating that the doctrine of *Brown v. Maryland, supra*, was inapplicable.

Petitioner has been unable to find a case decided in the Supreme Court of the United States in which the imposition of a franchise tax, license fee or bonus measured upon imported goods remaining in their original packages was held to be constitutional. It is respectfully submitted that this question has been decided by this court only in *Brown v. Maryland, supra*, and that the doctrine laid down in that case applies with full force to the present facts with a result that the Pennsylvania Foreign Bonus, as imposed, must be declared unconstitutional as violating ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES.

(b) The imposition of a bonus of one-third of one percent upon the value of tobacco imported from foreign countries constitutes a regulation of commerce with foreign nations, which is in violation of ARTICLE I, SECTION 8 of the CONSTITUTION OF THE UNITED STATES, and an interference with the power of Congress to regulate commerce with foreign nations.

This Court, in the case of *McGoldrick vs. Gulf Oil Corporation*, 309 U. S. 414 (1939), in an unanimous decision, held that Congress, by enacting the TARIFF ACT OF 1930, had

assumed exclusive control and jurisdiction over the subjects set forth in the TARIFF ACT OF 1930, and that REGULATIONS 942 had been ratified by Congress and were a part of the supreme law of the land. While the importation of oil was involved in the *Gulf Oil Corporation case,* the TARIFF ACT OF 1930 and REGULATIONS 942 also govern the importation of tobacco. This Court stated:

> "* * * (2, 3) *The statutes and regulations taken together operate as regulations of foreign commerce, as the legislative history shows they were intended to do.* The Tariff Act of 1930, 19 U. S. C. A. 1001 et seq., of which 601 of the Revenue Act of 1932 is in effect a part, is entitled, 'An Act to provide revenue, *to regulate commerce with foreign countries,* to encourage the industries of the United States, to protect American labor, and for other purposes.'" (at page 427)
>
> "* * * (4, 6) *The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce.* HAMPTON, JR. CO. v. UNITED STATES, 276 U. S. 394, 411, 48 S. Ct. 348; 72 L. Ed 624; BOARD OF TRUSTEES OF UNIVERSITY OF ILLINOIS v. UNITED STATES, supra, 289 U. S. 58, 53 S. Ct. 510, 77 L. Ed. 1029.
>
> "* * * The question remains, whether the present tax conflicts with the congressional policy adopted by the Acts of Congress which we have discussed. * * * In furtherance of that end Congress provided for the *segregation of the imported merchandise from the mass of goods within the State,* prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation. It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen

> the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. See PEOPLE OF STATE OF NEW YORK v. COMPAGNIE GENERALE TRANSATLANTIQUE, 107 U. S. 59, 63, 2 S. Ct. 87, 90, 27 L. Ed. 382. The Congressional regulation, read in the light of its purpose, *is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulations prescribing the exemption from state taxation, when applied to the facts of the present case states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce.* SINNOT v. DAVENPORT, 22 How. 227, 16 L. Ed. 243; PEOPLE OF STATE OF NEW YORK v. COMPAGNIE GENERALE TRANSATLANTIQUE, supra, 107 U. S. 63, 2 S. Ct. 90, 27 L. Ed. 383; cf. KELLY v. STATE OF WASHINGTON, 302 U. S. 1, 9, 10, 58 S. Ct. 87, 91, 92, 82 L. Ed. 3." (Emphasis supplied.) (at pages 428, 429)

This Court, in the above entitled case, held that the New York City Sales Tax, imposed on the purchaser, constituted a regulation of foreign commerce, which was prohibited by ARTICLE I, SECTION 8, of the CONSTITUTION OF THE UNITED STATES, the TARIFF ACT OF 1930 and the Treasury Regulations promulgated thereunder. This Court further held that Congress, in enacting the TARIFF ACT OF 1930, had assumed exclusive control and jurisdiction over the subject matter set forth therein. This Court held that the TREASURY REGULATIONS had been subsequently ratified by Congress and were a part of the supreme law of the land. The TARIFF ACT and REGULATIONS covering the im-

portation of crude oil also cover the importation of tobacco from foreign countries.

The reasoning of this Court in the *Gulf Oil Corporation case* applies with even greater force to the exaction of a bonus from the importer, based on the valuation of imports remaining in their original packages.

3. CONCLUSION.

It is, therefore, respectfully submitted that the imposition of a bonus of one-third of one percent upon the value of imported tobacco remaining in original packages constitutes the laying of an impost or duty upon imports in violation of ARTICLE I, SECTION 10(2) of the CONSTITUTION OF THE UNITED STATES, and this is so whether the impost or duty be denominated, a tax, an excise, a license fee or bonus, and secondly:

The exaction of a bonus of one-third of one percent upon the valuation of imported tobacco remaining in original packages constitutes a regulation of foreign commerce in violation of ARTICLE I, SECTION 8, of the UNITED STATES CONSTITUTION, ACTS OF CONGRESS enacted pursuant thereto and TREASURY REGULATIONS enacted under said ACTS OF CONGRESS.

Accordingly, it is respectfully submitted that the record in this case presents a federal question of substance, which has been decided by the Supreme Court of Pennsylvania in a way probably not in accord with the decisions of this Court, and THAT THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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